United States District Court
Eastern District of Michigan

United States of America,

Plaintiff,

Hon. Victoria A. Roberts

v.

Case No. 18-20255

D-3 James Warner,

Defendant.
_____/

Government's Trial Brief

Contents

Introduction

While employed as a field inspector at the Wayne County Airport Authority (WCAA), James Warner engaged in multiple schemes to

defraud the WCAA out of millions of dollars. As one part of the scheme, Warner drafted and submitted fraudulently inflated invoices for work William Pritula's companies were contracted to perform at the airport. Upon payment by the WCAA to Pritula, Pritula kicked back roughly half of the profits to Warner—a total of over $5 million over approximately four years.

Another of Warner's criminal conspiracies closely paralleled the conspiracy he engaged in with Pritula. As he did for Pritula, Warner created and submitted invoices on Douglas Earles's behalf for plumbing, maintenance and installations, which Earles's company Northstar Plumbing purportedly performed at the airport. Many of the invoices Warner submitted on Earles's behalf were inflated in both the scope and type of work performed. After drafting and submitting the invoices to the WCAA, Warner approved their fabricated contents so that Earles could be paid in full by the WCAA. Upon receipt of payment from the airport, Earles paid Warner a percentage of his contracts.

Yet a third scheme involved Warner's demands for money from Gary Tenaglia of Envision Electric to insure the company obtained and

retained work and contracts at the airport. Initially, Warner would provide Tenaglia with inside information in order to help him win a contract. After the WCAA awarded the contract to Envision, Warner inspected or supervised the inspection of Tenaglia's work and concealed any mistakes from the WCAA. In exchange, Warner forced Tenaglia to pay him approximately ten per cent of each invoice.

Warner left the WCAA in August of 2014, shortly after the airport conducted an internal audit of some of these frauds. In January of 2017, Warner began working for the Water and Sewer Department in West Bloomfield Township. By this time, Tenaglia was cooperating with federal law enforcement after admitting to fraudulent conduct at the airport. At the direction of the government, Tenaglia reached out to Warner who proposed they continue the kickback arrangement they had at the airport. They reached an agreement (during recorded conversations) wherein Tenaglia would continue to give Warner ten percent of each invoice paid by West Bloomfield Township.

In January of 2009, Warner submitted to the WCAA a request for approval for outside employment. In the section entitled "Nature of

Work," Warner wrote the words "grass cutting and snow plowing." The WCAA provided a copy of this document to the agents. On August 16, 2017, Warner's lawyer provided the agents with a copy of the same document, with the word "consulting" added to the section describing the nature of work.

Summary of the Counts

Counts one through four of the fifth superseding indictment encompass the bribery, theft and money laundering conspiracies Warner engaged in with Pritula. Counts five and six relate to a similar conspiracy Warner engaged in with Earles. Counts seven, eight, and nine relate to Warner's scheme to defraud both the WCAA and West Bloomfield Township with Tenaglia. Count ten relates to Warner's attempt to obstruct justice by altering his report of outside employment form. As stipulated and agreed to by the parties, the government intends to present evidence of each of the three conspiracies in installments. Below is a summary of potential evidentiary issues that may arise during trial.

Evidentiary Issues

I. Use of Charts and Exhibits during Opening Statements

In its opening statement, the government intends to display exhibits that it will later seek to admit during trial, as well as some summary charts. The government's opening will be confined to a summary of the issues in the case and the evidence the government intends to offer which it believes in good faith will be available and admissible. *See*, ABA Standards for Criminal Justice 3-5.5 (3d ed. 1993); *Testa v. Mundelein, Illinois*, 89 F.3d 443, 445 (7th Cir. 1996); *see also*, *United States v. Brockington*, 849 F.2d 872, 875 (4th Cir. 1988).

II. Summary Charts and Exhibits

In several instances, the government intends to present charts summarizing the contents of voluminous documents such as bank records, invoices and receipts, pursuant to Federal Rule of Evidence 1006. Once admitted under Rule 1006, each summary chart will be substantive evidence, and the jury may refer to it during deliberations.

The government's summary charts will satisfy all necessary preconditions for admissibility under Rule 1006:

1. The charts will summarize materials that are "so 'voluminous' that they 'cannot conveniently be examined in court' by the trier of fact." *United States v. Bray*, 139 F.3d 1104, 1109 (6th Cir. 1998) (quoting *United States v. Seelig,* 622 F.2d 207, 214 (6th Cir.1980)).

2. The government will have made each summary chart—and all of the materials underlying each summary chart—available for inspection and copying by each of the four defendants. *Bray*, 139 F.3d at 1109.

3. The underlying materials will be admissible under the Federal Rules of Evidence. *Bray*, 139 F.3d at 1109-10.

4. The charts will accurately summarize the information contained in the underlying materials correctly and in a non-misleading manner. *Bray*, 139 F.3d at 1110.

5. The government will lay a proper foundation for each summary chart, using testimony from an agent who has catalogued the underlying materials, is familiar with their contents, and has participated in the preparation of the chart. *Bray*, 139 F.3d at 1110; *Scales*, 594 F.2d at 561-63.

The government's summary charts will therefore be admissible under Rule 1006. And because they will be admissible as substantive evidence—and not just as demonstrative exhibits—the jury need not receive a limiting instruction regarding their use. *Bray*, 139 F.3d at 1110.

The government also intends to introduce summary charts pursuant to Federal Rule of Evidence 611(a), which implicitly authorizes the publication of charts that summarize or show the relationship between items of evidence admitted during the trial. "These 'pedagogical' devices are not evidence themselves, but are used merely to aid the jury in its understanding of the evidence that has already been admitted." *See United States v. Janati*, 374 F.3d 263, 273 (4th Cir. 2004); *United States v. White*, 2013 WL 6512922 (7th Cir. Dec. 13, 2013).

Any pedagogical devices offered by the government will meet the necessary requirements that it:

(a) summarize or illustrate evidence, such as documents, recordings, or trial testimony that has been admitted in evidence;

(b) will not be admitted into evidence;

(c) may reflect to some extent, through captions or other organizational devices or descriptions, the inferences and conclusions drawn from the underlying evidence by the summary's proponent.

United States v. Bray, 139 F.3d 1104, 1111 (6th Cir. 1998). *See also United States v. Mohney,* 949 F.2d 1397 (6th Cir. 1991) (use of flowchart as visual aid to explain profit skimming was proper with limiting instruction explaining that "the chart is not itself evidence but is only an aid in evaluating the evidence.").

In appropriate circumstances, such pedagogical devices may be admitted in evidence even though not within the scope of Rule 1006. "Such circumstances might be instances in which such pedagogical device is so accurate and reliable a summary or illustration or extrapolation of testimonial or other evidence in the case as to reliably assist the factfinder in understanding the evidence, although not within the specific requirements of Rule 1006." *Bray*, 139 F.3d at 1111-12; *accord United States v. Kerley,* 784 F.3d 327, 341 (6th Cir. 2015)(these "[s]econdary-evidence summaries are a hybrid of summaries admitted under Federal Rule of Evidence 1006 and pedagogical-device summaries [and] 'are

admitted in evidence not in lieu of the evidence summarize but *in addition thereto*") (quoting *Bray,* 139 F.3d at 1112).

III. Hearsay and Confrontation Clause Issues

The government's evidence will include testimony about statements made by both Warner and his co-conspirators. Some of these statements are memorialized in writing as emails, and some are oral, such as recorded telephone conversations (described more fully in Section III.C., below). These statements are admissible under one or more of the following theories: (1) admissions by a party opponent; (2) non-hearsay, because they are not offered to prove the truth of the matter asserted; or (3) statements subject to a specified hearsay exception.

A. Party Admissions

Federal Rule of Evidence 801(d)(2)(A) classifies admissions by party-opponents as non-hearsay when the "statement is offered against a party and is the party's own statement, in either an individual or representative capacity…" This rule excludes admissions by a party-opponent offered against the party from the definition of hearsay because the adversarial process allows the party-declarant to rebut his or her own admissions by testifying at trial. *See* Fed. R. Evid. 801(d)(2) & advisory

committee's note. Under Rule 801(d)(2)(A), "the proponent of an out-of-court statement must satisfy two requirements: (1) that the statement is made by a "party"; and (2) that the statement is offered against that party" in order for the statement to constitute non-hearsay. *Canter v. Hardy*, 188 F. Supp. 2d 773, 782-83 (E.D. Mich. 2002). Warner's own statements will therefore be admissible against him personally under Rule 801(d)(2)(A), as statements made by a party opponent. Fed. R. Evid. 801(d)(2)(A); *United States v. Matlock*, 415 U.S. 164, 172 (1974). Other statements will qualify as adoptive admissions under Rule 801(d)(2)(B) because Warner will have "manifested an adoption or belief in [the statements'] truth." *United States v. Williams*, 445 F.3d 724, 735 (4th Cir. 2006); *see also Safavian*, 435 F. Supp. 2d at 43-44 (statements in emails attributed to defendant "come in as admissions by a party opponent under Rule 801(d)(2)(A)" and forwarded emails are admissible as adoptive admissions where defendant "manifested an adoption or belief" as he forwarded emails).

While the government can offer Warner's statements—both oral and in writing—as non-hearsay under the second prong of Rule 801(d)(2)(A) (where statements must be offered "against a party"),

Warner is not entitled to introduce evidence of his own out-of-court statements regardless of the inculpatory or exculpatory nature of statements. Rule 80l(d)(2)(A) is designed to prevent a party from introducing his own self-serving statements under the guise of party admissions. *United States v. Palow,* 777 F.2d 52 (1st Cir. 1985); *see also United States v. Marin,* 669 F.2d 73, 84 (2d Cir. 1982) ("When the defendant seeks to introduce his own prior statement for the truth of the matter asserted, it is hearsay, and it is not admissible."). Indeed, if such statements were deemed admissible under Rule 801(d)(2), parties "could effectuate an end-run around the adversarial process by, in effect, testifying without swearing an oath, facing cross-examination, or being subjected to first-hand scrutiny by the jury." *United States v. McDaniel*, 398 F.3d 540, 545 (6th Cir. 2005). Warner should therefore be precluded from offering evidence of his out-of-court statements at trial as supposed party admissions.

B. Statements Not Offered For the Truth

In addition to Warner's admissions, the government will also seek to admit oral and written statements made by cooperating defendants and other witnesses during their conversations with Warner. Such

evidence will not be offered for the truth of any matter asserted, but as non-hearsay evidence under Federal Rule of Evidence 801; such as, to give context to Warner's statements, or to show the effect the statements have on the listener. *Crawford v. Washington*, 541 U.S. 36, 40 (2004); *United States v. Jacob,* 377 F.3d 573 (6th Cir. 2004) (statements of cooperator in recorded conversations not hearsay where not introduced for truth of matter asserted but to provide context for defendant's admissions); *United States v. Burt*, 495 F.3d 733, 738-39 (7th Cir. 2001) (non-party's half of conversation admissible as context for defendant's half). Such statements do not implicate the Confrontation Clause because "testimonial statements [offered] for purposes other than establishing the truth of the matter asserted" are not barred by the Sixth Amendment. *United States v. Faulkner*, 439 F.3d 1221 (10th Cir. 2006). *United States v. Stines*, 313 F.3d 912, 919 (6th Cir. 2002).

Many of the non-hearsay statements will also qualify as verbal acts. "A verbal act is an utterance of an operative fact that gives rise to legal consequences." 5 Weinstein's Federal Evidence § 801.11[3] (2012). For verbal acts, "[i]t is the fact that the declaration was made, and not the truth of the declaration, which is relevant." *United States v. Childs*,

539 F.3d 552, 559 (6th Cir. 2008). Thus, where a statement directs the formation and operation of a conspiracy, illegally solicits someone else to do something, or discusses a kickback arrangement, that statement is significant regardless of the truth or falsity of its assertions. What matters, rather, is that the declarant made the statement at all. *See United States v. Brewer*, 332 F. App'x 296, 302 (6th Cir. 2009); *Rodriguez-Lopez*, 565 F.3d at 315; *Childs*, 539 F.3d at 559; *United States v. Faulkner*, 439 F.3d 1221, 1226-27 (10th Cir. 2006); *see also* 5 Weinstein's Federal Evidence § 801.11[3] (2012). And in this case, a number of statements will show Warner's agreement with cooperating witnesses to engage in a theft and bribery scheme. The importance of these statements is not their truth or falsity; the importance is simply that the declarants made them. The statements are therefore admissible as verbal acts. Other statements will consist solely of questions or commands—which are not hearsay because they do not assert anything. *See United States v. Rodriguez Lopez,* 565 F.3d 312, 314 (6th Cir. 2009); *United States v. Wright,* 343 F.3d 849, 865 (6th Cir. 2003).

C. Exceptions to the Hearsay Rule

1. Statements about a then-existing mental condition

Many of the statements that are, in fact, hearsay will be admissible as an exception to the hearsay rule. For instance, because some of the statements will show the declarant's "then-existing state of mind (such as motive, intent, or plan)," those statements will be admissible under Rule 803(3). As explained above, those statements will include emails and recorded phone conversations that reveal Warner's influence at the airport and at the West Bloomfield Township water and sewer department, as well as statements made by individuals affected by each conspiracy.

2. Evidence of a witness's prior consistent statement

Depending on the substance of the defendant's cross-examination of the government's witnesses, the government may also seek to introduce a witness's prior consistent statements. Such prior consistent statements will be admissible on two grounds: (1) as substantive evidence under Federal Rule of Evidence 801(d)(1)(B), and (2) for rehabilitation of the witness's credibility. *United States v. Argo*, 23 F. App'x 302, 308

(6th Cir. 2001); *United States v. Toney*, 161 F.3d 404, 408 (6th Cir. 1998); *United States v. Smith*, 746 F.2d 1183, 1185 (6th Cir. 1984).

If Warner makes "an express or implied charge that [a witness] recently fabricated [his testimony] or acted from a recent improper influence or motive," the government may introduce that witness's prior consistent statements as substantive evidence under Federal Rule of Evidence 801(d)(1)(B). A prior consistent statement is admissible under Rule 801(d)(1)(B) if the witness made it before he had a motive to lie. *See Toney*, 161 F.3d at 408. Thus, "[w]hen counsel for the defendant implies that a witness's testimony has been fabricated in exchange for a favorable plea agreement, a prior consistent statement made before the plea agreement was negotiated is admissible under Rule 801(d)(1)(B)." *Argo*, 23 F. App'x at 308

To invoke Rule 801(d)(1)(B), the government need not show that the defendant has *expressly* charged recent fabrication or improper motive. Indeed, the rule itself makes clear that an "implied charge" alone is sufficient. Fed. R. Evid. 801(d)(1)(B). As the Seventh Circuit has explained, "[t]he fact that defense counsel may not have intended to imply that [the witness's] story was fabricated [recently] is irrelevant if

that inference fairly arises from the line of questioning he pursued." *United States v. Baron*, 602 F.2d 1248, 1253 (7th Cir. 1979). Thus, if defense counsel implies on cross-examination that a witness's testimony is recently fabricated or is the result of improper influence or motive, the witness's prior consistent statements may be admitted to rebut that implication.

The government may also use prior consistent statements for rehabilitation. As the Sixth Circuit has noted, the government's ability to introduce prior consistent statements for rehabilitation is even broader than under Rule 801(d)(1)(B):

> The trial court has greater discretion to admit prior consistent statements to rehabilitate an impeached witness, by clarifying or explaining his prior statements alleged to be unreliable, than if the statements are offered for their truth under Rule 801(d)(1)(B).... [The] use of prior consistent statements for rehabilitation is particularly appropriate where, as here, those statements are part of a report or interview containing inconsistent statements which have been used to impeach the credibility of the witness.... This rehabilitative use of prior consistent statements is also in accord with the principle of completeness promoted by Rule 106.

United States v. Denton, 246 F.3d 784, 789 (6th Cir. 2001) (citations and internal quotation marks).

3. Use of Undercover Recordings

During trial, the government will introduce undercover tape recordings between Warner and Tenaglia, a cooperating codefendant. As described above, Warner's recorded statements are not hearsay because they are admissions of a party opponent and Tenaglia's are not hearsay because they provide context for Warner's admissions. Tenaglia may testify regarding the contents of these recorded conversations even if the recording has already been played for the jury because he is corroborating the recordings. *United States v. Branham,* 97 F.3d 835 (6th Cir. 1996). Tenaglia's description of the conversation in his own words, including his explanation of the meaning of phrases in context are not "opinion" testimony. *United States v. Martin,* 920 F.2d 393 (6th Cir. 1990).

4. Admissibility of business records

During its case-in-chief, the government will offer into evidence a variety of self-authenticating business records, including bank records and records of public agencies. Those records will be admissible under Federal Rule of Evidence 803(6), as records of a regularly conducted activity. The records may be introduced by a custodian of records or an otherwise qualified witness. The otherwise qualified witness can include

a government agent who is familiar with the record keeping system. *United States v. Laster*, 258 F.3d 525, 529 (6th Cir. 2001). The records in this case will also be self-authenticating under Federal Rules of Evidence 902(11, 13, 14), because they will be accompanied by an affidavit of a person with knowledge that includes a statement that the records were kept in the course of a regularly conducted activity, kept as a regular practice, and/or generated by an electronic process or system that produces an accurate result. The government has already satisfied Rule 902(11, 13, 14)'s notice requirement.

IV. Impeachment By Prior Bad Acts – Fed. R. Evid. 608

The government anticipates calling several witnesses for whom impeachment information has been provided to defense counsel. Some of those witnesses have prior investigative files or other "bad acts" that defense counsel may attempt to delve into improperly during cross-examination. The Court should prohibit them from doing so. Federal Rule of Evidence 608(b) limits impeachment by prior bad acts to cross-examination about a witness's character for truthfulness. *See* Fed. R. Evid. 608(b). Thus, Rule 608(b) forbids defense counsel from

impeaching a witness with extrinsic evidence regarding credibility. Fed. R. Evid. 608(b); *United States v. Frost*, 914 F.2d 756, 767 (6th Cir. 1990).

The Second Circuit has identified a non-exhaustive list of seven factors to determine whether a separate incident involving a false statement is probative: (1) whether the prior incident involved a fact-finding about the witnesses' credibility generally or case-specifically; (2) whether the other incident involved similar subject matter; (3) whether the other falsehood was made under oath; (4) was the other falsehood about a significant matter; (5) the temporal proximity of the other falsehood to the facts in this case; (6) the witnesses' apparent motive; and (7) whether the witness has a plausible explanation for the other false statement. *United States v. White,* 692 F.3d 235 (2d Cir. 2012). But even in circumstances where a fact-finder made a formal opinion regarding a witness's credibility in a separate matter, the witness cannot be asked about the opinion, itself, because it is extrinsic evidence and hearsay. *United States v. Richardson,* 793 F.3d 612 (6th Cir. 2015) ("[A] judicial opinion making a credibility determination does indeed appear to be the type of extrinsic evidence disallowed by Rule 608(b).")

In this case, defense counsel may attempt to ask government witnesses about the fact that some of them were the subject of prior investigations, which concluded without prosecution or a conviction. Such questions are impermissible under Rule 608(b). Although defense counsel may ask the witness if he committed a prior bad act that pertains to his truthfulness, defense counsel may not ask about a prior federal investigation to bootstrap the credibility of those allegations. As the Eighth Circuit has explained, "when the previous allegations of misconduct leveled against a witness resulted in no sanctions or sanctions completely unrelated to the witness' character for truthfulness, the danger is great that a jury will infer more from the previous investigation than is fairly inferable." *United States v. Alston*, 626 F.3d 397, 405 (8th Cir. 2010); *see also United States v. Novaton*, 271 F.3d 968, 1005-1007 (11th Cir. 2001) (holding that past allegations or investigations were not admissible without a conviction, because they did not speak to the truthfulness of a witness); *United States v. Cracium*, 1990 WL 54132, *3 (6th Cir. 1990) ("Unless the actions are probative of truthfulness, they must result in conviction before special treatment is given to felonious acts under section 608(b) . . . Untruthful character is

not established upon a mere showing that the witness acted immorally or violated the law.").

Even if they could satisfy Rule 608(b), defense counsel's questions would still be impermissible under Rule 403. Under Rule 403, the Court may exclude evidence if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, wasting time, or needless presentation of cumulative evidence. Fed. R. Evid. 403. Because defense counsel's questions would create confusion and unfair prejudice, this Court should exclude them. *See United States v. Beltran-Garcia*, 338 F. App'x 765, 772 (10th Cir. 2009) (approving the district court's exclusion of evidence of a testifying officer's misconduct because of risk of confusion and prejudice).

V. Use of Agent Reports

A third party's notes about a person's statements are not the same as a person's actual statements and therefore are inadmissible as a statement of the witness. *See United States v. Severson,* 49 F.3d 268, 271-72 (7th Cir. 1995); *United States v. Schoenborn,* 4 F.3d 1424, 1427 (7th Cir. 1993) (a third party's characterization of a statement is not the same as an actual prior statement unless the witness subscribed to that

characterization); *United States v. Burton,* 387 Fed.Appx. 635, 638 (7th Cir. 2010) (same); *United States v. Adames,* 56 F.3d 737, 744-45 (7th Cir. 1995) (if an attorney begins the impeachment process thinking the witness had made a previous statement, but the witness denies adopting that statement, and the attorney can offer no further proof that the witness made the adopting statement, the impeachment must cease). However, a third party's statement can be used to impeach a witness if the witness adopted the statement as his own. *See United States v. Wimberly,* 60 F.3d 281, 286 (7th Cir. 1995) (a witness adopted a statement when she read an agent's report, made corrections, and signed the document).

A document, such as an agent report, may be used to refresh a witness's memory only after his or her memory has been exhausted. Thus, it is improper to refresh the memory of a witness with a statement attributed to him in an FBI report where the witness did not claim lack of memory, and simply denied having made the statement. *United States v. Carpenter,* 819 F.3d 880, 891 (6th Cir. 2016).

VI. Admissible Fact and Lay Opinion Testimony

At trial, the government will call a number of current and former

WCAA and West Bloomfield Township employees who have experience with the personnel, accounting, finance, and contracting procedures in place during the time that Warner was an employee at these two places. Federal Rules of Evidence 602 and 701, as interpreted by the courts of appeal in this circuit and numerous others, allow for such witnesses to answer questions such as "what if you had known" about certain facts and "what would you have done," where the hypothetical is based on the evidence in the record and elicits fact-based testimony based on the witness's own experience and reasoning. *See United States v. Kerley*, 784 F.3d 327, 336 (6th Cir. 2015)(district court did not abuse its discretion in bank/wire fraud case when the court allowed bank representatives "to opine about what [the banks] would have done had they known" that the defendants were not satisfying certain requirements for loan applicants); *accord United States v. Laurienti,* 611 F.3d 530, 549 (9th Cir. 2010) ("there appears to be no support for the proposition that the government cannot ask its own fact witnesses otherwise relevant ['if you had known . . . would you have'] questions that may have a guilt-assuming element" where they "were plainly relevant and probative [i]n order to establish materiality of Defendants' actions");

United States v. Munoz-Franco, 487 F.3d 25, 37 (1st Cir. 2007); *United States v. Hill,* 643 F.3d 807, 842 (11th Cir. 2011); *United States v. Powers,* 578 Fed. Appx. 763, 770-71 (10th Cir. 2014).

Rule 602 permits a fact witness to testify about "the fact of what he did not know and how, if he had known that independently established fact, it would have affected his conduct or behavior." *Unites States v. Cuti*, 720 F.3d 453, 459 (2d Cir. 2013). Such questions are relevant to each of the crimes Warner is charged with committing. Among other things, the government must show that Warner converted the airport's money to his own use "without authority." 18 U.S.C. § 666(a)(1)(A); Ind., Counts Two and Three. As such, the government must show that airport officials would not have authorized Warner to take the money "had they known" about it. This unauthorized theft is also inextricably intertwined with the kickbacks which came from the fraudulent invoices. Additionally, such "had you known" questions also explain why Warner hid both the theft and the kickbacks from the airport, and altered his "Report of Outside Employment," the latter action which forms the basis for the obstruction charge. (Ind.; Count Ten).

Because of the nature of Warner's misrepresentation at the airport and West Bloomfield Township, such "'what-if-you-had-known' questions that present withheld facts to a witness are especially useful to elicit testimony about" a misrepresentation's impact. *Cuti,* 720 F.3d at 458-59. This kind of testimonial account is permissible fact testimony. As Rule 602's advisory committee's note explains, personal knowledge of a fact "is not an absolute" condition for Rule 602's foundation requirement. Rather, a witness may testify in accordance with Rule 602 as to "what the witness thinks he knows from personal perception." Fed. R. Evid. 602 (1972 advisory committee notes).

Such testimony is also admissible as lay opinion testimony under Rule 701 because these witnesses, given their positions, have personal knowledge regarding the airport and West Bloomfield Township's human resources, accounting, employment, and contracting policies and practices. Personal knowledge can include inferences and opinions as long as they are based in personal observation and experience; the test is "whether a reasonable trier of fact could believe the witness had personal knowledge." Here, the "hypothetical facts" – i.e., the fact that Warner omitted and concealed the fact that he was inflating and fabricating

invoices, overcharging the airport, and receiving kickbacks from contractors at both the airport and West Bloomfield Township – will not only be based on the witness's perception, but will also "assist" the jury within the meaning of Rule 701(b). Fed. Rule Evid. 701(b); *see United States v. Whaley,* 860 F. Supp. 2d 584, 596 (E.D. Tenn. 2012) (proposed testimony of loan officers as to whether lenders would have approved loans to defendants in the absence of fraud was admissible as fact or as lay opinion because it was helpful as to whether the defendants made material misrepresentations).

Such testimony will not be rooted exclusively in the witness's expertise. When the issue for the fact-finder's determination is whether a witness would have acted differently if he had been aware of additional information—the witness so testifying is engaged in "a process of reasoning familiar in every day life." *See* Fed. R. Evid. 701 advisory committee's note, 2000 amend. The testimony of WCAA and West Bloomfield Township employees in response to hypothetical questions about how they would have acted differently had they been aware of additional information, is therefore also admissible as lay opinion under Rule 701.

VII. Anticipated *Freeman* Objections

Warner may object to the government's evidence by referring to the Sixth Circuit's decision in *United States v. Freeman*, 730 F.3d 590 (6th Cir. 2013). To the extent the government offers any lay opinion testimony under Federal Rule of Evidence 701, it will satisfy the contours of the rule. Rule 701 permits lay opinion testimony where it is:

> (a) rationally based on the witness's perception;
>
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
>
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701. And despite its recent decision in *Freeman*, the Sixth Circuit has permitted witnesses to testify under Rule 701—or other rules of evidence—in several circumstances that could come up during trial:

- **Background Testimony**. The Sixth Circuit has long permitted background testimony from an investigative agent, "constructing the sequence of events in the investigation," *United States v. Goosby*, 523 F.3d 632, 638 (6th Cir. 2008), and explaining "how and why [he or she] came to be involved with this particular

defendant," *United States v. Aguwa*, 123 F.3d 418, 421 (6th Cir.1997).

- **Reading Exhibits.** The Sixth Circuit has also approved of a witness "read[ing] aloud from documents that . . . [are] properly admitted"—even if there are "minor discrepancies between the reading and the written text"—as long as the jury has its own copies of the documents to review for itself. *United States v. Tragas*, 727 F.3d 610, 614 (6th Cir. 2013).
- **Directing a Witness to a Date or Event.** It is well settled that the government can "direct a witness's attention to a particular individual or date"—and can even use leading questions to do so. *United States v. Kuehne*, 547 F.3d 667, 692 (6th Cir. 2008); *see also* Fed. R. Evid. 611.
- **Interpreting a Witness's Own Conversations.** An investigative agent or any other witness who has participated in a conversation may testify about his or her understanding of what was being discussed. *United States v. Graham*, 856 F.2d 756, 759 (6th Cir. 1988) ("A government agent may, like any other witness, testify in the form of an opinion as to his understanding of a defendant's

statement."); *accord United States v. Martin*, 920 F.2d 393, 397–98 (6th Cir. 1990); *United States v. Smith*, 1998 WL 385471, at *4 (6th Cir. 1998).

- **Identifying Voices.** Any witness—even an investigative agent—may identify a person's voice if that witness has "hear[d] the voice at any time under circumstances that connect it with the alleged speaker." Fed. R. Evid. 901(b)(5); *United States v. Kelsor*, 665 F.3d 684, 697–98 (6th Cir. 2011) (citing cases).
- **Identifying Handwriting.** A lay witness may authenticate or identify a piece of handwriting if his familiarity with the handwriting "was not acquired for the current litigation." Fed. R. Evid. 901(b)(2); *United States v. Harris*, 786 F.3d 443, 445-47 (6th Cir. 2015).
- **Drawing Conclusions from Records.** An agent may review and draw conclusions from collections of records—even without being qualified as an expert—as long as "any reasonable lay person" could have reviewed and understood the same records in the same way. *United States v. Madison*, 226 F. App'x 535, 543–44 (6th Cir. 2007); *see also United States v. White*, 492 F.3d 380, 401 (6th Cir.

2007) ("[L]ay testimony results from a process of reasoning familiar in everyday life.").

None of the government's evidence in this case will run afoul of *Freeman*. In *Freeman*, the Sixth Circuit held that the case agent's testimony there violated Rule 701 because (1) his vague references "to the investigation as a whole" did not establish a sufficient foundation for his interpretations of the recorded phone calls—and perhaps even incorporated hearsay, *Freeman*, 730 F.3d at 596–97, and (2) his broad interpretations were not helpful, but rather "spoon-fed" the government's theory of the case to the jury, *id.* at 597–98. None of the government's planned testimony in this case will implicate either of those concerns.

VIII. Waiver of Conflict of Interest

Count ten of the fifth superseding indictment charges Warner with obstruction of justice. At trial, the government will present a January 2009 form entitled "Report of Outside Employment" for Warner, which it received from the WCAA in December of 2017. Eight months later, Warner's counsel provided the FBI with the same January 2009 form, which had been altered to include the word "consulting."

The government has discussed with defense counsel the potential conflict of interest posed by this evidence, and Warner has signed a form waiving any potential conflict. The government, however, requests that the Court voir dire Warner on this issue prior to any testimony regarding count ten.

Respectfully submitted,

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Certificate of Service

I certify that on May 13, 2019, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all attorneys of record.

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